SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 567

PAN-ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

vs.

JAMES FYFE AND JOHN T. BAILEY, DOING BUSINESS AS UNITED FIBRE COMPANY.

BRIEF IN SUPPORT OF PETITION OF PAN-ATLANTIC STEAMSHIP CORPORATION, FOR A WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion of the District Court (Goddard, D. J.) sustaining the exceptions to the libel of respondents Barber-Wilhelmsen Line and holding that the Manhattan Lighterage Corporation was a connecting carrier, is unreported (R. 26). The opinion of the District Court (Leibell, D. J.) holding the on-carrier, Pan-Atlantic Steamship Corporation, the petitioner herein, liable, is unreported (R. 129-138). The opinion of the Circuit Court of Appeals affirming the District Court is reported in 114 F. (2d) 72 (R.

147) and the opinion denying the petition for reargument is reported in 114 F. (2d) 77 (R. 158).

II.

Jurisdiction.

The Circuit Court of Appeals decided the appeal July 15, 1940 (R. 147). A petition for rehearing, duly filed, was denied on August 26, 1940 (R. 158). The jurisdiction of this Court is invoked under the provisions of Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 347(a).

III.

Statement and Summary of the Case.

The statement and summary of the case, with record citations, are set forth in the petition (*supra*, pp. 1-6, inc.).

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following respects:

1. In enlarging the terms of the *Harter Act*, 46 U. S. C. A. 190, by construction and holding illegal, null and void three clauses of the bills of lading (copied, *supra*, pp. 2 & 3), notwithstanding said provisions have been long used by ocean carriers and have been either sustained by decisions of this Court and the Circuit Court of Appeals for the Fifth Circuit or have not been passed upon except below in this case;

2. In construing the Fire Statute, 46 U. S. C. A. 182, never before so construed by any Court, to intend that

where a lighterage company which owned the ship on which the loss occurred has been exonerated from liability for damage to a cargo on its own ship, said Statute nevertheless permitted the court to hold the petitioner, a shipowner, liable notwithstanding the bill of lading had stipulated otherwise, and the merchandise in question had never been delivered to the petitioner, and if it were the employer of the Litherage Company that would not justify holding it liable after the Litherage Company had been exonerated;

3. In construing a plain rate-quotation letter between Pan-Atlantic and the Lighterage Company as a contract, making the Lighterage Company agent of Pan-Atlantic and thereby creating rights and obligations between them never contemplated by them or sustained by the decisions of any court and which made them liable for a risk never contemplated;

4. In concluding not to follow the law of the case as established by Judge Goddard in his final decree dismissing the libel as to Wilhelmsen, in which he held that the Lighterage Company was an independent carrier.

V.

ARGUMENT.

First Point.

The bills of lading issued by the initial carrier, Barber-Wilhelmsen Line, govern the entire transaction and fix the obligations of all participating carriers; and the clauses of the bills of lading, fixing the relationship with the carriers, are not void under the Harter Act, but expressly relieve the petitioner from responsibility for the loss sustained by the libellants-appellees, since the merchandise involved herein never came into its custody.

The bills of lading, paragraphs 11(e) and (g) (copied, *supra*, pp. 2 & 3) expressly provide that each shipper is an independent carrier and negative any joint enterprise or agency. Under the terms thereof each carrier is liable only while the goods are in its "own personal custody." Therefore, since the goods in question were not in the personal custody of the petitioner, it was expressly exonerated by the bills of lading and to hold it liable is to render nugatory the written contract of the parties and throw the whole scope of maritime contracts into uncertainty and confusion. This is contrary to the established law of merchant, sound public policy and international usage of the sea. It is introducing a novel and confusing innovation into international shipping and foreign commerce.

The paragraphs of the bills of lading fixing the relationship of the parties furthermore are valid because they merely state the pre-existing rule of the common law. *St. Louis Ins. Co.* v. *St. Louis, etc. R. R. Co.*, 104 U. S. 146; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Oregon-Washington Co.* v. *McGinn*, 258 U. S. 409; *Galveston Wharf Co.* v. *Galveston H. & S. A. R. Co., supra.* In the *Galveston* case, 285 U. S. 127, 135, the bill of lading provided that the carrier in possession of the property "shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided", and this Court held that under such bill of lading a Wharf Company was not the agent of the on-carrier and was not liable for the loss. This is the very contention the petitioner here is maintaining. The facts are even more favorable to the petitioner than to the prevailing litigant in the *Galveston* case, because here the shippers and the initial carrier expressly agreed in the bills of lading that the various carriers should be responsible only for the goods "whilst same are in their own personal custody", whereas, in the *Galveston* case,

they left the determination of the liability of the various carriers to the common law, except as provided otherwise.

The Harter Act does not prevent the shipper and initial carrier from fixing the responsibility of the several carriers in a through bill of lading.

The Harter Act, 46 U. S. C. A. 190, reads:

> "*Stipulations relieving from liability for negligence.* It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

There is not a word in this Act which would prevent a shipper and an initial carrier from contracting regarding the relationships of the various carriers under a through bill of lading. Its purpose was to prevent a carrier from limiting its liability "from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of * * * merchandise * * * committed to its * * * charge."

The bills of lading in this case were prepared with the Harter Act in mind (R. 12). All paragraph 11(g) said was that each shipper would only be responsible for loss while the goods "are in their own personal custody", or, in the words of the Harter Act, only while "committed to its charge."

The Circuit Court of Appeals cites no rulings of this Court in support of its holding that the clauses in the bills of lading are illegal.

The Fifth Circuit in *Inland Waterways Corp.* v. *Standard Commercial Tobacco Co.*, 65 F. (2d) 715, holds that the rule of this Court in *Oregon-Washington R. R. & Navigation Co.* v. *McGinn, supra*, applies to foreign commerce and that "each carrier is bound, in the absence of statute or contract *otherwise*, only for safe delivery to the next connecting carrier." Of course, a shipper and an initial carrier may always contract to limit the common law rule, but here they expressly contracted to adopt the substance of that rule and there is nothing in the Harter Act or decisions of this Court which holds it is illegal to so contract.

Second Point.

Pan-Atlantic Steamship Corporation, as a shipowner, is entitled to the protection of the Fire Statute, 46 U. S. C. A. 182.

The Fire Statute, 46 U. S. C. A. 182, reads:

> "*Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

The Fire Statute is a part of a statutory policy of Congress for certainty in the law respecting shipping and to encourage ship building and employment of ships in commerce, *Providence N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, where this Court held that the Statute must be *liberally construed in favor of carriers,* saying,

> "If the courts having the execution of it administer it (the Fire Statute) in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations, as before stated, will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

The Fire Statute, in terms, relieves the shipowners "unless such fire is caused by the design or neglect of such owner", and the Statute makes no other exception to the complete immunity granted, *Earle & Stoddard* v. *Ellerman's Wilson Line*, 287 U. S. 420, 425. Certainly the fire on the lighter "Sydney" of the Manhattan Lighterage Corporation was not caused by the "design or neglect" of Pan-Atlantic for it had nothing to do with it.

The Circuit Court of Appeals reasoned that Pan-Atlantic could be held liable since it was not the actual owner or charterer of the "Sydney" and because the Lighterage Company was its agent, saying, "the lighter is but a substitute for the ship" (R. 149). If, as the court points out, the lighter was but a substitute for the ship, under the clear and unambiguous language of the Statute, Pan-Atlantic should have been exonerated since the court held that the fire was not caused by the design or neglect of the owner. The court cites no decisions of this Court or any other Federal Court in support of its proposition that Pan-Atlantic is not entitled to the benefit of the Statute, but holds that the loss may be laid at the principal's door on the theory of the rule established by the New York Court of Appeals in *Schubert* v. *August Schubert Wagon Co.*, 249 N. Y. 253 (R. 152). That case has no application in con-

nection with an interpretation of the Federal maritime protective statute. The New York case was an automobile negligence case in which a wife was run down by a truck driven by her husband, and the wife was permitted to recover from her husband's employer although the husband himself was immune from suit.

Not only has the Circuit Court of Appeals refused to adopt a liberal construction of the statute, but has interpreted it in a manner never before construed by any court In *The Munaires*, D. C. E. D. La., 12 F. Supp. 913, the Fire Statute recently was *liberally* construed to hold that a carrier is not responsible for fire on a wharf that it had leased and was using exclusively. The Circuit Court of Appeals expressly disagreed with this case, saying, "Insofar as *The Munaires* may be interpreted to express views otherwise, we cannot agree" (R. 153).

Assuming, for the sake of argument only, that the Fire Statute does not by its own terms extend to this situation, it is competent to extend it by contract. The bills of lading so provide, paragraph 4 (copied, *supra*, pp. 2-3). In the opinion of the Circuit Court of Appeals it is pointed out "If this provision is valid Pan-Atlantic is, of course, relieved from responsibility" (R. 152). Why is the clause of the bill of lading not valid? It can only be rendered invalid by judicial construction and no court, except the court below, has directly held such a clause to be invalid. In *The Munaires*, 12 F. Supp. 913, 917, it was held that a shipowner could extend a statutory exemption from fire by contract, saying, "the shipowner is entitled to the benefit of the Fire Statute or bill of lading exemption, as the case may be", citing, *Earle & Stoddart* v. *Ellerman's Wilson Line*, 287 U. S. 420, and *Constable* v. *National S. S. Co.*, 154 U. S. 51, 62.

Third Point.

The Circuit Court of Appeals erroneously concluded as a matter of law that the Manhattan Lighterage Corporation was Pan-Atlantic's agent.

The carrier which had the goods aboard was exonerated and so, of course, the company that had not yet received the goods should be held to be equally free from liability. There was no agency relationship between the two carriers.

The Circuit Court of Appeals said, "Pan-Atlantic had a general contract with Manhattan for lightering its shipments. Manhattan was not an independent carrier" (R. 149). Pan-Atlantic did not select the Lighterage Company, but was instructed by Wilhelmsen "to lodge orders with the Manhattan Lighterage Corp., covering transfer of the above mentioned cargo as soon as same is available" (R. 86, Exhibit 1, R. 44). Pan-Atlantic had no general contract with the Lighterage Company (R. 56). The Circuit Court of Appeals misinterpreted the clear and unambiguous language of a rate-quotation letter (R. 102, Exhibit 14, R. 57) from the Lighterage Company to Pan-Atlantic as a general contract (Conclusion of Law I, R. 127; R. 148-149). Never before, has such a construction been put upon a rate-quotation letter by any court, and if permitted to stand will completely alter recognized practices among ocean carriers. In this the court erred. Had the rate-quotation letter been correctly construed, there would have been no agency relationship between Pan-Atlantic and the Lighterage Company and there would be no basis for the decision, even if the *erroneous theories* of the two courts below were good law.

Fourth Point.

The decision of Judge Goddard and the final decree dismissing the libel as to Wilhelmsen established the validity

of the bill of lading clauses in so far as this litigation is concerned, so that Pan-Atlantic cannot be held liable herein.

Judge Goddard correctly followed the rule of this Court in *Oregon-Washington R. R. & Navigation Co.* v. *McGinn, supra* (R. 26). That decision, having exonerated one of the respondents, established the law of the case and should have been followed by the Circuit Court of Appeals as *res judicata* (R. 149), *Northern Pacific Ry. Co.* v. *Slaght,* 205 U. S. 122.

A writ of certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

RUSSELL C. GAY AND
SHERWOOD E. SILLIMAN,
70 Pine Street,
New York, New York.